82-2140

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILBUR HOBBY, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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June 29, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether an "indefensible sort of entrapment" is brought about by United States criminal conviction for fraud in a CETA contract between Petitioner and North Carolina where there was open disclosure of all the facts in issue by Petitioner, and full authorization to proceed on these facts by the North Carolina contracting officers.

2. Whether the courts below erred in requiring Petitioner to make out a prima facie case of selective prosecution as a condition precedent to a threshold inquiry into that issue.

3. Whether the courts below erred in condoning the systematic exclusion of Blacks from appointment as foremen of federal grand juries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Wilbur Hobby respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on March 9, 1983.

OPINION BELOW

The opinion of the Court of Appeals is reported at 702 F.2d 466. It is appended hereto at p. 1-A.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 9, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied on April 29, 1983. This petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 USC sec. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 USC sec. 371 provides in pertinent part as follows: "Conspiracy to commit offense or to defraud United States:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy,

each shall be fined not more than $10,000, or imprisoned not more than five years, or both."

18 USC Sec. 665 provides in pertinent part as follows: "Theft or embezzlement from employment and training funds:

(a) Whoever, being an officer, director, agent or employee of, or connected in any capacity with any agency receiving financial assistance under the Comprehensive Employment and Training Act knowingly hires an ineligible individual or individuals, embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a grant or contract of assistance pursuant to such Act shall be fined not more than $10,000 or imprisoned for not more than 2 years, or both; . . ."

The Fifth Amendment to the Constitution of the United States provides in part that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury . . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The bed-rock facts here are that Wilbur Hobby, long-time President of the North Carolina AFL-CIO, owned a printing company named Precisions Graphics, Inc. Precision Graphics signed a contract under the Comprehensive Employment and Training Act of 1973 (CETA) with the North Carolina Department of Natural Resources and Community Development (NRCD) to train 40 unemployed and unskilled young men and women

as computer operators. The contract authorized payment of $130,833 to Precision Graphics. The contract was fully performed. The students were trained, and almost all obtained employment in their new fields. Precision Graphics billed the state only $88,786 for its services. It did the agreed upon job for about two-thirds of the agreed upon price. Some $42,047 remained available to educate and train other deprived youths in useful skills. Nevertheless, Wilbur Hobby was indicted and convicted on four counts of conspiracy and fraud in connection with this contract.

The somewhat unique circumstances require a brief exposition of what went on. To begin with, Wilbur Hobby was a welcome participant in the various state sponsored programs to train the unemployed for useful employment. Prior to the events here in issue, he had signed some 15 CETA contracts

(mostly on behalf of the AFL-CIO) with the state of North Carolina, its departments and agencies. (App. p. 1389) Mort Levi, the alleged co-conspirator here, was employed full time to prepare CETA proposals, and operate the programs on a day to day basis.

Wilbur Hobby and the AFL-CIO were also consumers of computer services, and knew of the shortages of skilled operators. (App. p. 1202) The consequence is that Wilbur Hobby and officials of the North Carolina NRCD began discussions very early in 1979 concerning a CETA program to train computer operators.

A 1978 amendment to the CETA Act was designed to involve the private sector, and it made funds available for that purpose (App. p. 574). For this reason the state officials suggested to Wilbur Hobby that he organize a private corporation to apply for

the proposed training grant, rather than apply in the name of the AFL-CIO. Wilbur Hobby and Mort Levi organized a corporation named Precision Data Institute, Inc., and Precision Data Institute filed a grant request for the training of data processing personnel. (App. p. 590) On March 26, the officials in the North Carolina NRCD recommended that this application be authorized. (App. p. 591)

Meanwhile, Wilbur Hobby had been negotiating with a company named Mohawk Data for the rental or purchase of computer equipment. The salesman informed him that the minimum lease would be for 42 months, and that the rental price for this period would exceed the purchase price by over $1,000. (App. p. 451) Hobby decided to buy, and on behalf of Precision Data Institute, signed a purchase contract on April 10, 1979.

Precision Data Institute had no assets, and Hobby told representatives of Mohawk Data that the payments would come from the CETA grant. (App. 472) Officials of the North Carolina NRCD testified that it is customary and proper to make advances for the purchase of equipment. (App. 560) In fact, they testified that some 90% of the contractors avail themselves of the advance system; most lack "up front" money and need an advance to get started. (App. 601)

Wilbur Hobby met with state officials immediately prior to his departure for Washington, D.C. to sign the purchase agreement with Mohawk Data. They knew he was going to purchase a computer, and they knew he would charge the purchase to his grant. (App. p. 679) They testified that this was permissible under the regulations. (App. p. 672)

A review process continued within the North Carolina NRCD, and the officials there decided it would be better to take the contract from Precision Data Institute and award it to Precision Graphics (the printing company owned by Wilbur Hobby). (App. p. 1502) Precision Graphics had a track record of successful CETA grants, and capital assets; Precision Data Institute had neither. Accordingly, Mort Levi sat down with state officials and prepared a new contract in the name of Precision Graphics. (App. pp. 660-663)

The contract between Precision Graphics and the North Carolina NRCD provided that the computer recently purchased by Precision Data Institute would be leased (along with the maintenance agreement) to Precision Graphics for the duration of the training period. (App. pp. 1506-1508) The amounts of the rentals were line items in

the budget submitted by Graphics, and approved by the state officials. (App. pp. 1506-1508)

This background takes us to the five counts of the indictment.

Count one is a general allegation that Wilbur Hobby and Mort Levi conspired to defraud the United States of funds and monies under the CETA contract between Precision Graphics and the North Carolina NRCD by purchasing computer equipment and computer maintenance services from Precision Data Institute, Inc., such purchases resulting in unlawful profits to Precision Data Institute, Inc. (App. p. 137)

The second count charges that Mort Levi (but not Wilbur Hobby) knowingly recruited individuals for the computer training program who were not eligible under the contract. The contract provided that the students would be recruited only from five

designated counties, and the government alleged in part that Mort Levi recruited students from other counties as well. For example Sonia Bailey, the first government witness on this score, was questioned closely on whether her home was in Person County, where her parents lived and where she went on weekends; or in Durham, where she resided in a boarding house during the week while attending school. The contract did not list Person County as one of the five counties from which Precision Graphics would recruit the students.[1/] Mort Levi was also charged with recruiting students who were ineligible under the law. No one is eligible for CETA programs if their income exceeds $3,023 for any twelve-month

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1/ Residents of Durham County, but not residents within the city of Durham, were eligible for the program. Sonia Bailey apparently lived within the city of Durham, which made all this examination unnecessary.

period. Bonnie Monsees, the government lead-off witness on this score, testified that Levi told her she was ineligible when she applied for the program because her tax form showed she had earned $5,000 in the previous twelve months. He told her she would become eligible if she went without any pay for the first 8 weeks of the program. These are samples of the "illegalities" charged in the indictment against Mort Levi.

The third count alleges that Wilbur Hobby (as President of Precision Data Institute) had a maintenance contract whereby Mohawk Data agreed to do the required maintenance at a rate of $214.00 per month. Wilbur Hobby then charged Precision Graphics (his printing company) the amount of $125.00 per week for this same service. This continued from May 21 through October 10, 1979, and allegedly resulted in an

illegal profit to Hobby (and Precision Data Institute) of approximately $1,840.00 (App. p. 142)

The defense to the third count was twofold. First, as a matter of law the complete disclosure nullified the allegation of "fraud". Second, as a matter of fact the Government was not complete in its description of the contract. In addition to the fixed amount, the maintenance contract between Mohawk and Precision Data Institute provided that repairs after 5:00 p.m. would cost an additional $60.00 per hour, with a 2 hour minimum; i.e., there would be a charge of $120.00 for each evening service call. (App. p. 497) Representatives of Mohawk further testified that it takes time "to get those bugs worked out" after the initial installation. (App. p. 445) In short, if the service men had to make more than two service calls a month

during the evening hours (classes went until 9:00 p.m.), Precision Data Institute would have been in the red on this service contract.

The fourth count charges Wilbur Hobby with fraud in the amount of rental charged Precision Graphics for the computer equipment and for the maintenance. A Government witness testified that CETA regulations applicable to transactions between organizations under common control limit the amount of rental to the amount that could be claimed as a depreciation on a tax return. The government witness further testified that the allowable depreciation in this case would have been $5,535. Anything above that amount, he testified, would be illegal. (App. p. 1446) Since Precision Data Institute charged Precision Graphics some $16,625 for computer rental and maintenance, there was an alleged over-charge

of $11,090. (App. p. 1506)

Again the defense was simple: there could be no "fraud" because Wilbur Hobby and the officials of the North Carolina NRCD acted in good faith when they agreed to a rental in the amount of $16,250. (App. p. 1545) It was also brought out on cross examination that some of the relevant CETA regulations were not published until July 20, 1979, "which could have been well into the time period of this contract". (App. p. 1521)

The fifth count charges Wilbur Hobby with fraud in charging Precision Graphics some $3,000 in rent for the use of the data processing equipment for the period of May 21, 1979 through June 15, 1979; a period when the equipment was not yet functionally in operation. (App. p. 143)

Again there is a simple defense. These first weeks of the program were utilized for an orientation program; students

testified that the instruction prior to the arrival of the computers was "very beneficial". (App. p. 748) Moreover, the total amount of the rent was set out in the contract, and pro-rated over the number of weeks. Rent was charged whether or not the machines were used at any particular moment on any particular week. Finally, the disputed rental payment had both prior authorization and subsequent ratification from the appropriate officials of the North Carolina NRCD, thereby negating any suggestion of "fraud".

The jury found Wilbur Hobby and Mort Levi guilty on all counts as charged. They were sentenced to 18 months in prison, to five years probation, and to a fine of $10,000 on each count. (App. pp. 1796-1800)

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Sanctioned "An Indefensible Sort of Entrapment" Contrary To The Holdings Of This Court in Cox v. Louisiana and Raley v. Ohio.

As indicated in the statement of the case, Wilbur Hobby and the appropriate state officials worked in close concert at every step of the CETA contract. There was full disclosure on the part of Wilbur Hobby, the state officials gave full approval after thorough intra- and inter-office disagreement and discussion. The very vouchers charged as fraudulent were prepared for Wilbur Hobby by Mr. Vincent Harris from the Fiscal Technical Assistance Unit of the North Carolina NRCD. (App. p. 1560) Wilbur Hobby submitted them without change. (App. pp. 1561-1563)

This Court has held that when public officials authorize the acts in question,

to sustain a later conviction for doing those acts "would be to sanction an indefensible sort of entrapment by the State." Put simply, "The Due Process Clause does not permit convictions to be obtained under such circumstances". Raley v. Ohio, 360 U.S. 423, 425-426, 438 (1959); Cox v. Louisiana, 379 U.S. 559, 571 (1965).

Here, the trial judge denied Wilbur Hobby's request that the jury be instructed that:

> "If a person discloses to a governmental agency the material facts necessary for an understanding of a particular transaction, or group of transactions prior to obtaining any funds from the governmental agency, and then submits requests for payment in connection with that transaction or transactions, and the governmental agency approves said requests for payment, then, as a matter of law, there can be found no fraud or misrepresentation in connection with the transaction or transactions". (App. p. 312)

Here, the Court of Appeals affirmed the District Court without discussion.

Raley and Cox differ from this case only in that they involved state convictions for actions which state officials earlier had authorized. This case involves a federal conviction for actions which state officials had earlier authorized; but the state officials were expending federal funds pursuant to a federal statute and under federal regulations.

It is submitted that the situation here presents a substantial question of due process which requires this Court's attention.

II.

The Decision Below Requiring a Prima Facie Showing To Trigger An Evidentiary Hearing On the Issue of Selective Prosecution Conflicts With the Holdings in Other Circuits, and Effectively Overrules the "Evil Eye and Unequal Hand" Doctrine of Yick Wo v. Hopkins.

A second major issue in this case arises out of the fact that Wilbur Hobby

was the first person ever to be prosecuted by the United States for CETA fraud in the Eastern District of North Carolina; despite ample official evidence that the audits of 379 other CETA contracts disclosed what are known as "questioned costs". The norm, the universal practice when costs are questioned, is to proceed by way of administrative review and civil suit; not as here by way of criminal indictment.

The procedure is set forth in the regulations and in the individual CETA contracts. If costs are questioned, the matter is referred to a division in the North Carolina NRCD known as the "Questioned Cost Resolution Unit". Following internal review in that unit, there is a conference with the contractor to review the problem. (App. p. 1567) If there is disagreement at that level, the issue can be appealed to the Atlanta regional office of the United

States Department of Labor. The decision of the United States Department of Labor is reviewable by the North Carolina state auditor; and ultimately the state can bring civil suit for breach of contract to recover the alleged "unallowable costs". (App. pp. 1568-1569)

None of that procedure was followed here. In fact, the federal government specifically requested the state of North Carolina to terminate this contractual method for resolving cost disputes; and began a criminal grand jury investigation. (App. p. 233)

Prior to trial, Wilbur Hobby moved for a hearing on the issue of selective prosecution. He did not move to dismiss the indictment for this reason, as he did not yet feel confident of all the facts.

In support of his motion for a hearing, Wilbur Hobby established a number of

threshold facts.

He established that his was the first criminal indictment ever by the United States in the Eastern District of North Carolina for CETA fraud. (App. p. 231)

He established that there were 379 other contemporaneous CETA contracts where audits disclosed questioned costs. (App. p. 232)

He established that in 55 of these other contracts, the questioned costs exceeded $50,000. (App. p. 232)

He itemized a number of well publicized contemporaneous situations where there was no federal prosecution. (App. pp. 233-234)[2/]

2/ The following are illustrative of well publicized situations which, perforce, came to the attention of the federal authorities.

"Now, there's a story on the 15th of March...of $148,000 that went for work that shouldn't have been done, allegedly, on the St. Augustine College campus".

"Between the 14th of September and the 21st of September in 1979, there were eight

Finally, he established that for a decade he had been the President of the North Carolina AFL-CIO, and for more years then that had been an outspoken and unabashed critic of established state leadership, as well as the established policies in regard to labor-management relations, in regard to racial segregation, in regard to questions of peace and war, in regard to consumer protection, in regard to women's rights, and a host of other controversial issues. (App. p. 233).

(footnote cont'd)

stories about CETA jobs that allegedly and improperly went to a State senator." (App. p. 233)

"Between the 13th of August of 1979 and the 3rd of July of 1980 there were fifteen stories about a $527,000 overcharge, alleged in regard to a program in Washington County". (App. p. 234)

"On the 13th of October of 1979, there was an allegation that a state NRCP employee approved the contract for $77,000 to a group in which her husband was a partner and from which he would specifically benefit". (App. p. 234)

Counsel for Wilbur Hobby submitted that they had established more than a "frivolous" or "colorable basis" to support the motion for an evidentiary hearing. (App. p. 235). The trial court denied the motion because Wilbur Hobby had not established a "prima facie case". (App. p. 241)

The Court of Appeals approved of this holding without discussion.

This requirement that Wilbur Hobby make out a prima facie case of invidious selective prosecution as a condition precedent to a threshold hearing where he can question government officials on this score has the practical consequence of overruling the doctrine of Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Almost a century ago this Court established that the law may not be applied and administered by "public authority with an

evil eye and an unequal hand." Yick Wo v. Hopkins, 118 U.S. 356 (1886). Of course "the conscious exercise of some selectivity in enforcement (of criminal laws) is not in itself a federal constitutional violation"; but it becomes so when the selection is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification". Oyler v. Boles, 368 U.S. 448, 456 (1962).

That much is clear. What remains uncertain is the standard to be applied when determining whether or not to grant an evidentiary hearing to explore this issue. The various Courts of Appeal are in conflict on this matter.

The Court of Appeals for the First Circuit has ruled that

> "A defendant need not, however, present a prima facie case in order to justify an evidentiary hearing. So long as the defendant alleges some facts (a) tending to show that he has been selectively prosecuted, and (b)

> raising a reasonable doubt about the propriety of the prosecution's purpose a district court, in the absence of countervailing reasons, should grant a request for a hearing". United States v. Saade, 652 F.2d 1126, 1135 (1st Cir. 1981).

The Court of Appeals for the Second Circuit has ruled that a "colorable basis" entitles the defense to subpoena documentary evidence required to establish a selective prosecution defense. The Court explained: "we would first require some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." United States v. Berrios, 501 F.2d 1207, 1211-1212 (2d Cir. 1974) (emphasis supplied).

The Court of Appeals for the Third Circuit is in accord: "central to the issue must be some initial showing that there is a colorable basis for the

contention". United States v. Berrigan, 482 F.2d 171, 177 (3rd Cir. 1973) (emphasis supplied) Accord, United States v. Torquato, 602 F.2d 564 (3rd Cir. 1979): To meet the required "threshold showing of discriminatory prosecution before an evidentiary hearing will be accorded", the defendant bears the burden of proving "a colorable entitlement to the claim of selective prosecution. Some credible evidence must be adduced indicating that the government intentionally and purposefully discriminated against the defendant by failing to prosecute other similarly situated persons". 602 F.2d at 569-570.

The Court of Appeals for the Fourth Circuit in this case approved a standard demanding a prima facie as a threshold requirement for an evidentiary hearing on selective prosecution.

The Court of Appeals for the Fifth

Circuit meets the defense of selective prosecution with "extreme skepticism"; on the theory that "the courts are not free to interfere with the free exercise of the discretionary powers of the attorneys of the United States over criminal prosecutions". United States v. Kelly, 556 F.2d 257, 264 (5th Cir. 1977). Accordingly, it will not permit questioning of the prosecutors without some prior demonstration by the defendant "that his complaint might have merit". 556 F.2d at 265.

The Court of Appeals for the Sixth Circuit states that "Government attorneys have great latitude in deciding which potentially criminal actions to prosecute"; consequently the "offer of proof" of selective prosecution must "show that the decision to prosecute him was made in bad faith and was based upon

impermissible considerations". United States v. Cooper, 577 F.2d 1079, 1086 (6th Cir. 1978).

The Court of Appeals for the Seventh Circuit, en banc, with one concurrence and four dissents, wrote as follows regarding the question of proof necessary to trigger a hearing:

> "The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice. However, when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, we think a different question is raised". United States v. Falk, 479 F.2d 616, 620-621 (7th Cir. 1973). (emphasis supplied)

The Court of Appeals for the Eighth Circuit is ambiguous on this issue. In United States v. Warinner, 607 F.2d 210 (8th Cir. 1979) a panel held that the defendant must establish a prima facie

case "to warrant a hearing". 607 F.2d at 213.[3] In United States v. Larson, 612 F.2d 1301 (8th Cir. 1980), a different panel held that "A hearing is necessary only when the motion alleges sufficient facts to take the question past the frivolous stage and raises a reasonable doubt as to the prosecutor's purpose". 612 F.2d at 1304-1305.

The Court of Appeals for the Ninth Circuit holds that the defendant ultimately "must bear the burden of proving a prima facie case". United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975). But as a preliminary matter, "hearings on similar pretrial objections are usually in order when enough facts are alleged to take the question past the

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3/ The trial court in the instant case relied upon Warinner. (App. p. 240)

frivolous stage", and that is enough in a motion for an evidentiary hearing in a selective prosecution situation. United States v. Oaks, 508 F.2d 1403, 1404 (9th Cir. 1974). Accord, United States v. Erne, 576 F.2d 212, 216 (9th Cir. 1978) (A defendant is entitled to an evidentiary hearing "when enough facts are alleged to take the question past the frivolous stage".)

The Court of Appeals for the Tenth Circuit apparently has not decided the quantum of proof necessary to trigger a preliminary hearing.

The Court of Appeals for the District of Columbia Circuit holds that "where all that is being sought is discovery", it "makes sense to require a colorable claim" before "subjecting the Government to discovery". Attorney General of U.S. v. Irish People, Inc., 684

F.2d 928, 947 (D.C. Cir. 1982).

The short of the matter is that "In recent years there has been an explosion in the number of cases in which claims of invidiously selective prosecution have been made"; United States v. Kelly, 556 F.2d 257, 264 (5th Cir. 1977) and the Courts of Appeals are in conflict, if not in confusion, on how these issues are to be treated in the first instance. It is therefore appropriate for this Court to grant certiorari in this case, and provide leadership guidance.

III.

The Decision Below Condoning The Systematic Exclusion of Blacks From Judicial Appointment as Forepersons of Grand Juries Denies Due Process of Law, and Conflicts with Decisions In Other Circuits and With The Decision Of This Court In Rose v. Mitchell.

The third major issue in this case arises out of the fact that there were fifteen grand juries in the Eastern

District of North Carolina from the years 1974 through 1981, and the federal judges appointed only white males to serve as foreman on each one of them.

Wilbur Hobby moved to dismiss the indictment for this reason. He introduced testimony from James M. O'Reilly, a "statistical social science consultant" (App. p. 170) that during these years there were no Blacks or women appointed as forepersons (App. p. 177), and only three Blacks and six women were appointed as deputy forepersons. App. pp. 189-90).[4/]

The trial judge denied the motion to dismiss (App. p. 213) and the Court of Appeals affirmed. (Appendix to Brief, pp. 13-19)

This conflicts with the applicable decisions of the Court of Appeals for the

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4/ Co-defendant Mort Levi is Black.

Fifth and Eleventh Circuits, and with the rationale of this Court in Rose v. Mitchell, 443 U.S. 549 (1979).

The Court of Appeals for the Fifth Circuit first assumed that "the right to a grand jury selected without regard to race applies fully when only the selection of the foreperson is at issue rather than the selection of the entire grand jury venire". Williams v. State of Miss., 608 F.2d 1021 (5th Cir. 1979). The Court of Appeals for the Fifth Circuit then expressly held, en banc, that the Equal Protection Clause is violated "by the systematic exclusion of black persons from service as grand jury foremen". Guice v. Fortenberry, 661 F.2d 496, 498 (5th Cir. 1981).

The Fifth Circuit cases involved the exclusion of Blacks from the leadership position of grand jury foreman of

state grand juries. The Court of Appeals for the Eleventh Circuit followed these cases when the issue involved the exclusion of Blacks from appointment as foremen in the federal grand jury system. The Eleventh Circuit expressly rejected the government contention that "the office of federal grand jury foremen is of no constitutional or statutory significance, and therefore, appellant cannot seek relief through the protection of the Fifth Amendment". United States v. Perez-Hernandez, 672 F.2d 1380, 1384 (11th Cir. 1982).

The Court below discussed these cases, and respectfully disagreed. The Court distinguished the significance of the role played by the foremen of the state grand juries with that played by the foreman of the federal grand jury, and said that the duties of the federal foremen are "ministerial" only. He "has

no special powers or duties beyond those borne by every grand juror, that meaningfully affect the rights of persons charged with crime". Accordingly, the Court below concluded that

> "The impact of the federal grand jury foreman as distinguished from that of any other grand juror, upon the criminal justice system and the rights of persons charged with crime is minimal and incidental at best. Any suspicion that his office may enlarge his capacity to influence other grand jurors is too vague and uncertain to warrant dismissal of indictments and reversals of convictions". (Appendix to Opinion, pp. 17-18)

In effect, the Court below ruled that the continued refusal to appoint Blacks as foremen of federal grand juries was not prejudicial to the defendant in this case, and therefore constitutionally irrelevant. But this is directly in conflict with the principal thrust of this Court's opinion in Rose v. Mitchell, 443 U.S. 545 (1979).

This Court framed the initial argument there as "whether claims of grand jury discrimination should be considered harmless error when raised, on direct review or in a habeas corpus proceeding, by a defendant who has been found guilty beyond a reasonable doubt by a properly constituted petit jury at trial on the merits that was free from other constitutional error". This Court then held that racial discrimination in the selection of grand jury foremen[5/] was not and could not be harmless error.

This Court wrote that "discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of

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5/ This Court assumed "that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire grand jury venire". 443 U.S. at 551-552, n. 4.

members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process". 443 U.S. at 556. It "impairs the confidence of the public in the administration of justice"; and the harm "is not only to the accused" but "it is to society as a whole".

The Court reminded that "Because discrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole", "for nearly a century" it had reversed convictions "where discrimination in violation of the Fourteenth Amendment is proved", and always "without regard to prejudice". 443 U.S. at 556.

The Court acknowledged that "there

are costs associated with this approach"; but believed that "such costs as do exist are outweighed by the strong policy the Court consistently has recognized of combating racial discrimination in the administration of justice". 443 U.S. at 558.

The Court concluded on this point that: "We adhere to our position that discrimination in the selection of the grand jury remains a valid ground for setting aside a criminal conviction". 443 U.S. at 559.

Rose v. Mitchell may be strong medicine, but so are the Equal Protection and Due Process Clauses of the Constitution. Unless this Court is willing to see them denigrated piecemeal, it should grant certiorari and reverse the decision below. There is no question but that the issue is both significant, and

recurrent.[6/]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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June 29, 1983

6/ The Court below lists some of the District Court cases in which the issue has been recently presented. Appendix to the Opinion, p. 15, n. 6

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Samuel T. Currin, United States Attorney, Eastern District of North Carolina, United States Post Office Building, Raleigh, North Carolina 27608.

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UNITED STATES COURT OF APPEALS
For the Fourth Circuit
No. 82-5143

Unites States of America, Appellee,

versus

Wilbur Hobby, Appellant.

No. 82-5144

United States of America, Appellee,

versus

Mort Levi, Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina. W. Earl Britt, District Judge

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Argued November 12, 1982

Decided March 9, 1983

Before HALL and Phillips, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge

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Shelley Blum; Thomas C. Manning (Cheshire, Manning & Parker on brief) for Appellants; Janis H. Kockritz, U.S. Dept. of Justice (Samuel T. Currin, United States Attorney on brief) for Appellee.

HAYNSWORTH, Senior Circuit Judge:

Wilbur Hobby and Mort Levi were convicted of conspiring to defraud the United States of funds appropriated under the Comprehensive Employment and Training Act in violation of 18 U.S.C.A. §§ 371 and 665. In addition, Hobby was convicted of misapplying or obtaining by fraud monies granted under CETA in violation of § 665, while Levi was convicted of hiring ineligible persons for training in a program established with CETA monies in violation of § 665. Each was sentenced to imprisonment and now appeals his conviction.

I.

Wilbur Hobby was president of the AFL-CIO in North Carolina and owner of Precision Graphics, Inc., a printing company located across the street from the union office. He had involved himself

many times with CETA projects,[1] and in one of those projects he had worked with Mort Levi.[2] The union had need of computer servuces in its daily business, and typically such services were obtained by contracting with outside companies. Hobby conceived the idea that he might provide such services through the acquisition of a minicomputer compatible with the national union's big computer.

In January 1979, Hobby began discussions with a representative from Mohawk-Data Sciences about acquiring a computer for union work. Over the next two to three months, discussions about what equipment was necessary continued. In

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1. In all Hobby had signed 15 CETA contracts between early 1977 and late 1979.

2. During one of Hobby's CETA funded printing training programs in 1978-79, Hobby paid Levi $2,500 for "curriculum committee support."

the meanwhile, however, Hobby and Levi formed a new company, Precision Data, Inc. Levi was shown on the articles of incorporation as an incorporator and also was listed as registered agent. Hobby owned 95% of the corporation's stock and was its president.

In February 1979, the newly formed corporation, Precision Data, submitted to the North Carolina Department of Natural Resources and Community Development a CETA grant request for funds to train data processing personnel. The application was received with skepticism, both because of doubt of the need of another program in that vicinity and because Precision Data had no staff, capital, plant or experience in computer training. The director of the Division of Community Employment of NRCD suggested that the contract be awarded to Precision Graphics

because of its previous experience with CETA contracts. Levi met with two NRCD employees and drafted a new CETA application on behalf of Precision Graphics.

On May 21, 1979, the application of Precision Graphics for a grant of $129,429 was placed on NRCD's authorization list.

Meanwhile, in April, Hobby, on behalf of Precision Data, had contracted to purchase a computer from Mohawk. The purchase price was $41,317.68, to be paid with a down payment of $10,329.42 and twenty-four equal monthly installments of $1,721.57. In addition, Precision Data agreed to pay Mohawk $214 a month for maintenance.

On the same day that the application of Precision Graphics was placed on the contract authorization list, in a contract signed by Hobby, Precision Graphics agreed to lease Precision Data's computer

for a monthly rental of $3,000 and a maintenance fee of $500 a month.

In late May, a CETA contract with Precision Graphics was signed and an advance of $43,696, requested by Levi, was paid. Almost immediately thereafter Hobby transferred $18,000 from the account of Precision Graphics to the account of Precision Data to cover a check he had earlier drawn on the computer. The $18,000 check was said to be "$9,000 for transportation and $9,000 for computer rental." In early July, Hobby wrote another check from Precision Graphics to Precision Data as payment for computer rental, this one for $5,000. Thus, notwithstanding that the computer was not even in place until June 15, Precision Graphics expended and Precision Data received for the audit period beginning May 21 and ending September 30, 1979,

$14,000 for computer rental.[3] Moreover, Precision Graphics paid Precision Data for computer maintenance at the rate of $500 a month beginning May 21, though Precision Data's obligation to pay Mohawk for such services did not begin to run until July 16, 1979, and then only at the rate of $214 a month.

The largest diversion of funds, however, occurred in connection with charges for the transportation of students. Almost $28,000 was charged to Precision Graphics by Precision Data for services that never were provided.

Levi recruited the students, and had a number of ineligible students falsify statements to make them appear eligible.

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3. The contract subsequently was extended for six weeks to mid-November, but the events that occurred after September 30 were not addressed in the audit nor are they relevant to this appeal.

Beginning in late August, a supervisor of an "Independent Monitoring Unit" in NRCD began to monitor Precision Graphics' CETA contract. When she and other employees of NRCD sought to meet with Hobby and Levi, they were rebuffed by Levi, and later Hobby refused them free access to books and records and other materials they needed. Finally, in late September the Secretary of NRCD requested an audit by the state auditing office. It produced a report released in May 1980.

II.

Hobby urges reversal on fourteen separate grounds. Levi makes three points which parallel three of Hobby's. Most of the contentions are of little substance or frivolous, and only two seem to us to deserve discussion.

A.

Three counts of the indictment

charged Hobby with having procured CETA funds by fraud and diverting such funds for (1) purchase of data processing equipment, (2) the rental of such equipment, and (3) the maintenance of such equipment. The charge was in the conjunctive, though the statute, 18 U.S.C.A. § 665, is in the disjunctive. The statute is violated if the CETA funds are obtained by fraud or if they are diverted or misapplied. Hobby obtained a preliminary instruction, to which the United States did not object, stating both the statutory prongs in the conjunctive so the prosecution would be required to prove both fraud in obtaining the grant and misapplication of the funds. In his final instructions to the jury, however, the district judge properly charged the statutory offense stating the two prongs in the disjunctive. This, Hobby contends, was a deprivation

of his right of due process since his lawyer had been led to believe that he could obtain an acquittal upon a finding of no fraud in obtaining the grant, regardless of any later misapplication.[4]

If we assume that defense counsel was mislead by the prosecution and that the government had the burden of proving beyond a reasonable doubt fraud in obtaining the grant and misapplication of the funds, we can perceive no consequential prejudice to Hobby. Evidence of

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4. We doubt that defense counsel was misled. It is true that the indictment charged the matter in the conjunctive and, at Hobby's request, the district judge stated the matter in the conjunctive in his preliminary charge to the jury. The lawyer also points to the government's response to a pretrial motion in which at one place the two offenses appear in the conjunctive, but that followed a disjunctive statement clearly tracking the language of the statute. It would be supposed that the lawyer had read the statute and knew its provisions.

fraud in obtaining the grant and the misapplication of granted funds was derived from the records of the two corporations, Precision Graphics and Precision Data, the CETA applications, testimony relating to those documents and records and to events associated with them. The same core of operative facts forms the basis for finding fraud or misapplication, or both. Indeed, the two things were closely interrelated, for what Hobby did with the money tended to show both misapplication and fraud in obtaining the funds. Hobby admits that the allegation of fraud was the focus of his defense, and in making that defense he necessarily was required to do all that he could to explain and justify the expenditures. Counsel did not suggest what more he might have done in defense of the charge of misapplication of the funds. We cannot conceive of

anything that might have been done that was not done.

The principle upon which Hobby relies is not without support. In United States v. San Juan, 545 F.2d 314 (2d Cir. 1976), a woman was convicted of bringing into the United States a large sum of currency without having declared it. She crossed the border from Canada in a bus, and, at trial, the prosecution insisted that the offense was committed while the defendant was on the bus during inquiries by Customs agents and undertook the burden of proving its case on that basis. When the trial judge submitted the case to the jury, however, it instructed that they might convict on the basis of events that occurred after the plaintiff had been removed from the bus and escorted into the Customs House. The Court of Appeals decided there had been a deprivation of due

process since the prosecution had provided defense counsel with abundant reason to believe that he could and should focus his defense on the events and occurrences on the bus. We accept the principle, of course, but San Juan is not this case. Proof of both branches of the offense were found in the corporate books and records, fully explored by the audit. The audit revealed discrepancies that were the basis for finding acquisition of the CETA money by fraud and the misapplication of some of those monies. In this case it cannot be said that defense counsel directed his efforts at a different set of facts from those that became the basis for his client's conviction.

B.

Each of the defendants sought dismissal of the indictment on the basis of alleged discrimination in the selection

of grand jury foremen in the Eastern District of North Carolina. They produced evidence that in the years 1974-1981 no black had served as the foreman of the grand jury in that district, and no woman.

There is no contention of discrimination in the selection of the grand jury. They were selected under an approved plan designed to insure fair representation of blacks and of women. The contention is simply that in those years no judge had designated a black or a woman to act as foreman.[5]

In the context of a state grand jury, this question was presented to the Supreme Court in Rose v. Mitchell, 443 U.S. 545 (1979). The Supreme Court, however,

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6. We are informed that since the grand jury indicated Hobby and Levi there have been black grand jury foremen in the Eastern District of North Carolina.

found it unnecessary to decide whether or not a reversal of the conviction was required upon a showing of discrimination in the selection of grand jury foremen, for it found an insufficient showing of any such discrimination.

In [illegible]ce v. Fortenberry, 661 F.2d 496 (5th Cir. 1981) (en banc), the court held that discrimination in the selection of a foreman of a state grand jury required vacation of the conviction just as would a taint affecting the selection of all of the grand jurors. The Eleventh Circuit, in United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982), came to the same conclusion, though the case involved discrimination in the selection of the foremen of federal grand juries.[6]

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6. Similar problems have been presented to other courts. See, e.g., Williams v. Mississippi, 608 F.2d 1021 (5th Cir. 1979); (cont.)

The question which the Supreme Court deliberately did not decide in Rose v. Mitchell was much more debatable than the one with which we are confronted. Involved there was alleged discrimination in the selection of grand jury foremen in Tennessee. In that state the foreman was selected by the judge from the eligible population at large, not from just those drawn to serve. He serves a two-year term, during which he has considerably more authority than that of the presiding officer. He is authorized to assist prosecutors in investigating crime and to order the issuance of subpoenas to witnesses. An indictment is fatally defective unless it bears the foreman's signature. 443 U.S. at 548 n.1.

United States v. Cross, 516 F. Supp. 700 (M.D. Ga. 1981); United States v. Manbeck, 514 F. Supp. 141 (S.C. 1981); United States v. Holman, 510 F. Supp. 1175 (S.D.
(cont.)

The foreman of a federal grand jury is selected after the grand jury has been impaneled from among those who have impaneled. His only duties are ministerial. He has no special powers or duties, beyond those borne by every grand juror, that meaningfully affect the rights of persons charged with crime. The failure of a federal grand jury foreman to carry out those ministerial duties placed upon him by F.R.Cr.P. 6(c) generally will not invalidate an indictment. See, e.g., Frisbie v. United States, 157 U.S. 160 (1895).

The impact of the federal grand jury foreman, as distinguished from that of any other grand juror, upon the criminal justice system and the rights of persons charged with crime is minimal

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(Fla. 1981); United States v. Jenison, 485 F. Supp. 655 (S.D. Fla. 1979).

and incidental at best. Any suspicion that his office may enlarge his capacity to influence other grand jurors is too vague and uncertain to warrant dismissal of indictments and reversals of convictions.

The roles of grand jury foremen in the federal system differ substantially from the roles of grand jury foremen in Tennessee and other states. Federal grand jury foremen are without the significant powers authorized for Tennessee grand jury foremen. Their role is so little different from that of any other grand juror that the rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection.

We respectfully disagree with the contrary conclusion of the Eleventh

Circuit in Perez-Hernandez.

III.

Finding no merit in any of the other contentions of the defendants, their convictions are affirmed.

AFFIRMED.